



The Comptroller General
of the United States

Washington, D.C. 20548

Kanarik

Decision

Matter of: Waste Management, Inc.

File: B-225403.4

Date: January 30, 1987

DIGEST

Decision to postpone bid opening and amend solicitation to set aside procurement for small businesses after initially issuing solicitation on an unrestricted basis is proper where agency shows set-aside determination based on information discovered after the solicitation was issued was reasonable.

DECISION

Waste Management, Inc., a large business concern, protests a determination by the Air Force to set aside for exclusive small business competition invitation for bids (IFB) No. F05611-86-B-0085 for refuse collection services for the United States Air Force Academy. The protester contends that the Air Force abused its discretion in determining that this procurement should be set aside after initially issuing the IFB on an unrestricted basis. We deny the protest.

The IFB was issued August 12, 1986, on an unrestricted basis. The record indicates that, while in the past, the IFB for these services had been set aside, the contracting officer, based on a market survey of the local area and consultation with the local Small Business Administration (SBA) representative, concluded that there was insufficient small business interest to justify issuing the present IFB as a small business set-aside.

On August 15, 1986, C & S Sanitary (C&S), a local small business refuse collection firm, complained to the contracting officer concerning the decision not to set aside the IFB. C&S filed a written protest with the contracting officer on August 25. The protest was referred to the Air Force Headquarters, in Washington, D.C., which concluded that there was an insufficient basis to reverse the contracting

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officer's decision and denied the protest by letter dated September 30, 1986. C&S subsequently filed a protest with our Office. In addition, two other small business protests were filed with our Office. All three protesters stated they were small businesses interested in competing for the requirement. The Air Force also reports that it received several inquiries on behalf of other small business firms interested in competing for the requirement.

The Air Force states that because of this showing of small business interest and because of its view that the Air Force Academy's initial market survey limited solely to the local area was too restrictive, the decision was made to set aside the procurement. Air Force Headquarters directed the contracting officer to postpone bid opening and to amend the IFB to set aside the requirement. The three small business protests were dismissed as academic. On December 3, 1986, Waste Management protested the set-aside decision to our Office.

Bid opening occurred on December 5, 1986, and eight bids were received, seven from small business concerns and one from Waste Management, which was ineligible as a large business.

Waste Management contends that the Air Force's decision to set aside this procurement was unreasonable in view of the contracting officer's prior determination based on a market survey which showed the lack of availability of responsible small businesses. Waste Management asserts that the contracting officer improperly relied on information provided by congressional sources. Waste Management also argues that the fact that seven small business concerns bid is not relevant to the set-aside decision which has to be made prior to bid opening.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1986) generally requires that an acquisition be set aside exclusively for small business participation where there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that an award will be made at reasonable prices. In this regard, the decision to set aside a procurement for a small business is basically a business judgment within the discretion of the contracting agency which we will not question unless a clear showing is made that the agency abused its discretion. Burrelles' Press Clipping Service, B-199945, Mar. 2, 1981, 81-1 C.P.D. ¶ 152.

We have no basis to question the Air Force's decision to set aside the procurement. The record indicates that the Air Force received three formal protests from small businesses

against the agency's decision not to set aside the procurement and several letters supporting the protests from other interested small businesses. Although the Air Force initially believed an unrestricted procurement was proper, the Air Force reversed its decision when it received a substantial indication of interest in competing from small businesses.

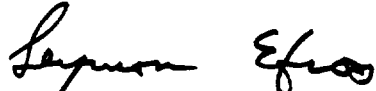
The Air Force now concedes that the market survey was too limited and in error. The subsequent small business interest in the procurement strongly supports the Air Force's position. Further, the fact that seven small business concerns submitted bids and four small business submitted prices lower than Waste Management's bid confirms the reasonableness of the Air Forces' decision. See American Dredging Co., B-201687, May 5, 1981, 81-1 C.P.D. ¶ 344.

With regard to Waste's contention that it was improper to set aside the procurement after issuing the IFB on an unrestricted basis, the fact that the solicitation originally was issued on an unrestricted basis does not preclude an agency from reconsidering that decision and setting aside the procurement where there is a reasonable basis for the set-aside determination at the time it is made. See Zytron Corp., B-219200, July 2, 1985, 85-2 C.P.D. ¶ 321; American Dredging Co., B-201687, supra. Although Waste Management challenges the set-aside determination as unreasonable, alleging improper political pressure, the protester simply has not rebutted the reasonableness of the agency's expectation based on new information discovered prior to bid opening that bids would be obtained from at least two responsible small businesses. In this regard, the record indicates that the decision to set aside was made in good faith and only after the agency was convinced adequate small business competition existed.

Finally, concerning Waste Management's contention that the agency had no reasonable basis to expect bids from two responsible small business concerns, the contracting agency need not make determinations tantamount to affirmative determinations of responsibility before determining to set aside a procurement for exclusive small business participation. Fermont Division, Dynamics Corp. of America; Onan Corp., 59 Comp. Gen. 533 (1980), 80-1 C.P.D. ¶ 438. While the standards of responsibility enunciated in the FAR may be relevant in making a set-aside determination, the agency only

is obligated to make an informed business judgment, which it did here, that there is a reasonable expectation of acceptably priced offers from a sufficient number of responsible small businesses. Id.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel